

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

SANDRA M. PETERS, on behalf :
of herself and all others :
similarly situated, :
:
Plaintiff, :
:
vs. : Case No.
:
:
AETNA, INC., AETNA LIFE :
INSURANCE COMPANY, and : CONFIDENTIAL
OPTUM HEALTH CARE SOLUTIONS, : ATTORNEYS' EYES ONLY
INC., :
:
Defendants. :

Washington, D.C.
Monday, June 25, 2018

Videotaped Deposition of:

DR. DANIEL P. KESSLER
called for oral examination by counsel for
Plaintiff, pursuant to notice, at Gibson, Dunn &
Crutcher, LLP, 1050 Connecticut Avenue, Northwest,
Washington, D.C., before Felicia A. Newland, CSR, of
Veritext Legal Solutions, a Notary Public in and for
the District of Columbia, beginning at 9:00 a.m.,
when were present on behalf of the respective
parties:

1 Q And so your opinion is that for a
2 member who would have reached the out-of-pocket
3 maximum regardless of the overcharges, there is no
4 injury, right?

5 A No, that's not necessarily my
6 opinion. No, that's not my opinion.

7 Q Why not?

8 A Well, because I'd have to break that
9 down a little bit. So, first of all, I don't -- I
10 mean, I don't think of things in terms of
11 overcharges, but if there were a participant who
12 had something that Dr. Panis describes as an
13 overcharge, that participant may recover the
14 Dr. Panis, quote, unquote, overcharge if they reach
15 their out-of-pocket maximum, but -- but may not,
16 depending on how far over their out-of-pocket
17 maximum they go and the magnitude of their
18 so-called overcharge.

19 Q So if the participant would have gone
20 over the out-of-pocket maximum regardless of
21 whether they were overcharged for particular
22 claims, then your opinion is that participant

1 wouldn't have economic injury, right?

2 A No. I don't think that's my opinion.
3 I mean, it would depend on the specifics of the --
4 of the participant's circumstance. You would have
5 to evaluate it person by person.

6 In this particular case, Ms. Peters
7 did experience zero economic impact for the reasons
8 that I discuss in my report.

9 Q Well, let's try a hypothetical.
10 Okay?

11 A Okay.

12 Q Let's say you have a participant with
13 \$1,000 out-of-pocket maximum --

14 A Yes.

15 Q -- and the provider charges her for a
16 fraudulent claim, \$100 for a service that was never
17 performed --

18 A Okay.

19 Q -- and in that year the participant
20 incurs claims up to \$2,500, right, so regardless of
21 whether there was a fraudulent claim or not, the
22 participant would have hit the out-of-pocket

1 maximum.

2 Is it your opinion that that
3 participant would suffer no economic injury from
4 the fraudulent claim?

5 A So the participant would be way over
6 her out-of-pocket maximum. I mean, yeah, that
7 participant then would not suffer direct economic
8 injury because she would have laid out the same
9 amount either way.

10 Q Is it your opinion that that number
11 would not have a remedy for the fraudulent claim?

12 MS. LOADHOLT: Objection to form.

13 MR. SIGLER: Objection to form and
14 foundation.

15 THE WITNESS: No. I mean, I don't --
16 I don't know about that. I mean, that's -- that
17 sounds like a -- I mean, a legal conclusion as to
18 whether a participant had a remedy. What I'm
19 saying is that in that hypothetical, there would
20 not be an economic injury to the participant.

21 Now, of course, the plan would have
22 had an economic injury by virtue of having to

1 have paid for a claim that in the hypothetical
2 was fraudulent.

3 BY MR. KNOTT:

4 Q And so in your view, the -- the
5 member having paid the \$100 to a provider for
6 something that was a fraudulent charge is not an
7 economic injury?

8 MS. LOADHOLT: Objection to form.

9 MR. SIGLER: Objection to form. Lack
10 of foundation.

11 THE WITNESS: No, I wouldn't say
12 that. I mean, in this example, the -- the question
13 is, you know, would the member have had an economic
14 injury in a but-for world -- would the -- would the
15 participant have been worse off had there been no
16 fraudulent activity versus having had there been
17 fraudulent activity and if either way the
18 participant would have met and far exceeded her
19 out-of-pocket maximum, then she would not have an
20 economic injury, but the plan certainly would.

21 BY MR. KNOTT:

22 Q If you isolated the fraudulent

1 charge, would the member have an economic injury?

2 MR. SIGLER: Same objections.

3 MS. LOADHOLT: Same.

4 THE WITNESS: Yes. If -- if you
5 weren't considering the member in terms of her
6 entire claims history, but just for that particular
7 claim, then she would have an economic injury,
8 because on that particular claim she shouldn't have
9 paid the fraudulent amount. I mean, that's a
10 different question than I understood that was at
11 issue in this case.

12 BY MR. KNOTT:

13 Q Paragraph 126, in the third sentence,
14 you say, "Ms. Peters benefited from the credits to
15 her deductible in 2014 created by the agreements."
16 Is that right?

17 A As compared to Dr. Panis' but-for
18 world, yes.

19 Q How did the agreements create the
20 credits to her deductible?

21 A Well, the agreements created the
22 credits to her deductible in excess of her actual

1 participant responsibility by virtue of her
2 deductible responsibility being based on the lesser
3 of the Optum downstream rates and the participant
4 responsibility based on the Aetna bundled payment
5 rates, while at the same time basing her deductible
6 credits on the bundle payment rates.

7 And so in the absence of the
8 agreements, she would not have received the -- she
9 would not have obtained the Aetna downstream rates
10 on which her actual participant deductible
11 responsibility was based, nor would she have had
12 credits to her deductible equal to the Aetna
13 bundled payment rates because neither of those
14 would exist.

15 Q I want to direct you back to the
16 exhibit that was the provider agreement. I think
17 it's 220.

18 A Yes.

19 Q If you look at page 631, there's a
20 Section 4.3.1. Do you see that?

21 A Yes.

22 Q [REDACTED]

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[REDACTED]

Did I read that correctly?

A Yes.

Q And you understand that the network
there is Optum, right?

A Yes.

Q So my question is: Where in this
agreement did you see that Optum would refrain from
collecting the entire deductible?

MS. LOADHOLT: Objection to form.

MR. SIGLER: Objection to form and
foundation.

THE WITNESS: I'm not sure I
understand. Do you mean -- can you -- what do you
mean by "entire deductible"? I don't understand
that.

1 BY MR. KNOTT:

2 Q Aetna calculated the deductible based
3 on the Aetna bundled payment rate, right?

4 A Yes. For purposes of accumulating
5 the participant towards the participant's
6 deductible, yes.

7 Q But not for purposes of what the
8 participant owed, right?

9 A Yes. The participant responsibility
10 was the lesser of the Optum downstream rate and the
11 Aetna bundled payment.

12 Q And my question is: Did you see that
13 somewhere in this agreement that that was the rule?

14 MS. LOADHOLT: Objection to form.

15 MR. SIGLER: Objection to form and
16 foundation.

17 THE WITNESS: I -- I don't remember
18 where I learned that. I -- this agreement is, I
19 mean, hundreds of pages, I could, I suppose, look
20 through it. I don't remember if it was in here or
21 not.

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